Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) can be a basis for an injunction that requires a union to give rail carriers ten days advance notice of any strike, when the language of Section 2 First imposes no advance notice requirement, this Court's decisions under Section 2 First have rejected expansive readings of that provision and narrowly limited the scope of enforceable obligations of labor and management under that provision and such application of Section 2 First will necessarily open up a broad range of union and carrier activity to regulation by the courts, in a manner contrary to the design of the RLA and this Court's precedent concerning the role of the courts under the RLA?

LIST OF PARTIES

Petitioner:

Brotherhood of Maintenance of Way Employees

Respondents:

Burlington Northern & Santa Fe Railway Co.

Consolidated Rail Corp.

CSX Transportation, Inc.

Kansas City Southern Railway Co.

Norfolk Southern Railway Co.

Union Pacific Railroad Co.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Court, petitioner states that it is a labor union and thus has no parent companies or non-wholly owned subsidiaries.

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
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v.

BURLINGTON NORTHERN and
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Brotherhood of Maintenance of Way Employes ("BMWE"), respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Burlington Northern And Santa Fe Railway Company, et al. v. Brotherhood of Maintenance of Way Employes*, 286 F. 3d 803 (5th Cir. 2002), which was entered on April 4, 2002. BMWE filed a petition for rehearing en banc that was denied on August 30, 2002.

OPINIONS BELOW

The panel opinion of the Court of Appeals for the Fifth Circuit is reported at 286 F. 3d 803, and it is reproduced as Appendix B to this Petition at 3a-22a. The decision of the United States District Court for the Northern District of

Texas, that was affirmed by the Fifth Circuit is reported at 143 F. Supp. 2d 672, and it is reproduced as Appendix C at 23a-66a. The Order of the Court of Appeals denying panel rehearing and rehearing en banc is not reported; it is reproduced as Appendix A at 1a-2a.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on April 4, 2002. Petitioner filed a timely petition for rehearing en banc. The Fifth Circuit entered its decision denying the petition on August 30, 2002. This Petition is timely under 28 U.S.C. § 101 (c) and Rule 13 of the Rules of the Court since it is being filed within ninety days of issuance of the order of the Court of Appeals denying rehearing and rehearing en banc. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

At issue in this case is the proper interpretation, scope and application of Section 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 First. Section 2 First provides as follows:

> It shall be the duty of all carriers, their officers agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

This case concerns an unprecedented effort by all of the Nation's large rail carriers ("Carriers") to require that BMWE provide them with at least ten (10) days advance notice of any

strike, even though there is no such requirement in Section 2 First, or any other part of the RLA. A divided panel of the Court of Appeals upheld the District Court's conclusion that BMWE could be ordered to give advance notice of strikes under RLA Section 2 First because BMWE had struck in response to carrier actions in past disputes without giving advance notice to the carriers involved. The Court of Appeals therefore affirmed the District Court's order that permanently enjoined BMWE from any strikes against the Carriers unless it gives the requisite advance notice of its plans.

In their complaint in the District Court, the Carriers asserted that BMWE had a policy or practice of striking in disputes over collective bargaining agreement provisions that are required to be arbitrated under Section 3 of the RLA (45 U.S.C. §153), and that BMWE had a policy and practice of doing so without providing advance notice to the carriers involved. District Court, App. C. at 24a-25a; 32a-33a. The complaint described decisions in other previously litigated cases over an eight year time span in which BMWE struck in response to carrier actions that BMWE viewed as involving unilateral changes in agreements, and thus as "major disputes" under Section 2 Seventh of the RLA (45 U.S.C. § 152 Seventh). The District Court observed that the strikes in those cases were temporarily and/or preliminarily enjoined by the other courts, and that a number of the disputes were subsequently found to be "minor disputes", over which strikes are unlawful because such disputes must be arbitrated under RLA Section 3. App. C at 33a-44a. Although BMWE presented evidence countering the Carriers' description of the various prior disputes, and their description of the decisions in those cases, the District Court granted summary judgment to the Carriers.[1]

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[1] As the dissenting judge on the Court of Appeals noted, BMWE demonstrated that there were strikes or attempted strikes in only twelve of the eighteen cases cited by the Carriers and the District Court; the other

The District Court found that "BMWE has a pattern, practice and policy" of exercising self-help "over what BMWE claims are unilateral changes in agreements" and "that those activities have occurred in the case of minor disputes and before major dispute procedures if they applied, would be exhausted". App. C at 61a-62a. The District Court held that, in either situation, any strike without advance notice would violate Section 2 First. The District Court concluded that its Order would "serve the goal of the RLA 'to avoid any interruption of commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'" App. C at 61a-64a.

The Fifth Circuit affirmed the District Court's decision. The panel majority held that the decision was supported by the language of Section 2 First, and that the injunction was consistent with the D.C. Circuit's decision in *Delaware & Hudson Ry. Co. v. UTU*, 450 F. 2d 603 (D.C. Cir. 1971), and the 11th Circuit's decision in *Delta Air Lines, Inc. v. Air Line Pilots Ass'n.*, 238 F.3d 1300 (11th Cir. 2001). App. B. at 6a-9a.

The majority rejected BMWE's assertion that the plain language of Section 2 First does not require advance notice of a strike; in so holding, the majority cited the provision's "mandate that labor and management 'exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce". App. B at 6a-7a, ellipses in

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cases involved instances where BMWE would not rule out a strike. 5th Cir dissent App. B at 16a n.3. BMWE also demonstrated that, in three of the twelve actual strike or attempted strike cases, the carriers involved voluntarily ceased the actions that gave rise to the strikes; and in two of the cases BMWE prevailed in the District Court but lost on appeal. 5th Cir dissent App. B. at 21a and n.s 4 and 5. BMWE also presented evidence that, in another two of the cases, the anti-strike injunctions were conditioned upon cessation of, or limitations on, the disputed carrier actions.

original. But the panel majority specifically stated that "[w]e need not, and do not address the question whether the RLA forbids *all* surprise strikes". App. B. at 9a, emphasis in original. The majority viewed the history of BMWE strikes without advance notice as sufficient to support issuance of an injunction under Section 2 First.

The Court below also rejected BMWE's argument that the District Court's broad reading of Section 2 First would subject a whole range of currently lawful union and carrier actions to regulation under Section 2 First. The Court said that:

> § 152 First applies only to actions that cause "interruption of commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof". 45 U.S.C. § 152 First. The actions posited by BMWE, while they may make dispute resolution more difficult, do not, in and of themselves, interrupt commerce, while surprise strikes undeniably do. And strike prevention, not dispute resolution *per se*, was "the major purpose of the Railway Labor Act".

App. B at 9a-10a, citation omitted.

The majority did not address BMWE's argument that the District Court's application of Section 2 First conflicts with decisions of this Court regarding Section 2 First, such as *Chicago & North Western Transp. Co. v. United Transportation Union*, 402 U.S. 570 (1971) ("*CNW v. UTU*"); *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987) ("*BN v. BMWE*"); and *Virginian Ry. Co. v. System Federation No. 40, RED*, 300 U.S. 515 (1937). Nor did the majority address BMWE's argument that the District Court's decision was contrary to decisions of this Court regarding the limited role of the Courts under the RLA, such as *Texas & New Orleans R.R. Co. v. B'hood of Ry. & Steamship Clerks*, 281 U.S. 548 (1930); *General Committee of Adjustment of the Brother-*

hood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., 320 U.S. 323 (1943); and *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989). The majority also rejected BMWE's arguments that *Delaware & Hudson Ry. Co. v. UTU* and *Delta Airlines v. Air Line Pilots Ass'n.* were clearly inapposite. App. B. at 7a n.4 and 8a-9a; *see also* dissent at 18a-19a.

The dissenting Judge concluded that the language of the statute did not support the majority's holding that strikes without advance notice violate Section 2 First, and that the majority had effectively amended the statute by judicial action, applying policy preferences rather than the law as written by Congress. App. B. at 15a, 17a-18a. The dissenting judge also agreed with BMWE that *Delta Airlines v. Air Line Pilots Ass'n.* and *Delaware & Hudson Ry. Co. v. UTU* are distinguishable from this case and that the language from *Delaware & Hudson Ry. Co. v. UTU* that was relied on by the majority was indeed dicta. App. B. at 18a-19a.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that this Court should review the decision below because the Fifth Circuit has created a duty that does not exist under the RLA, applied Section 2 First in a way that conflicts with decisions of this Court that have rejected broad readings of Section 2 First and limited the scope of application of that provision, and made a radical change in the rights and obligations of labor and management in two important industries.

Section 2 First contains no prohibition against strikes. And, unlike Section 6 of the RLA, which contains a formal notice requirement and expressly describes detailed procedures that must be followed before the use of self help, there is no language in Section 2 First that requires that a party give advance notice, or follow any other procedure, before engaging in self help. In fact, the Fifth Circuit's decision did

not cite any notice requirement in Section 2 First; instead, it relied on the general mandate that parties should exercise every reasonable effort to settle disputes, and the stated goal of avoiding interruption of commerce, as creating a duty to give advance notice.

Not only is the Court of Appeals' decision without a basis in the statute, but it also directly conflicts with decisions of this Court that have rejected broad readings of Section 2 First and carefully circumscribed the scope of application of that provision. Indeed, this Court has relatively recently rejected the Carriers' effort to read another statutory prohibition into the general language of Section 2 First and its goal of avoiding disruptions of commerce. *BN v. BMWE*, 491 U.S. at 450-452. The decision below is also contrary to this Court's repeated holding that the courts have a limited role under the RLA; a holding that was based on recognition that the RLA was the product of prolonged negotiations between rail labor and rail management, was enacted as presented to Congress with a design to foster voluntary resolution of disputes with few mandatory requirements, and envisioned a minimal role for administrative and judicial compulsion. The Court of Appeals' decision is thus contrary to the language of the statute and its structure and history, as well as decisions of this Court regarding the limited scope of Section 2 First.

Moreover, the Court of Appeals established a dramatic new role for the courts in the administration of the Act that the courts were not given by Congress. The Fifth Circuit's interpretation of Section 2 First opens up a whole new range of conduct of labor and management to judicial oversight and injunctive orders. While the Court of Appeals asserted that its decision was limited to these facts and this union (Decision at 4), there is no principled way to limit that Court's expansive reading of Section 2 First to the particular actions of this one Union. If the Fifth Circuit's decision is allowed to stand, it will mean a significant expansion of the scope of Section 2

First, and a significant expansion of the role of the courts in the enforcement of the RLA. This unprecedented expansion comes 76 years after enactment of the RLA and many years after various Congressional amendments to the statute. If the Court does not reverse the Fifth Circuit's decision, both carriers and unions will increasingly resort to the courts to resolve disputes that the RLA reserved to the parties, not an administrative agency or the courts.

The decision below is reminiscent of the day when the courts issued injunctions in labor disputes based on their own notions of what was reasonable behavior and good labor policy, an approach to labor law that was rejected by the RLA and repudiated by the NLGA. *CNW v. UTU*, 402 U.S. at 583; *BN v. BMWE*, 481 U.S. at 437-438, 443, 451 n.15, Accordingly, the Court should grant the writ to reverse a decision that conflicts with decisions of this Court and to prevent a judicial re-making of the basic design of the Railway Labor Act.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH PRECEDENT OF THIS COURT REGARDING THE SCOPE OF SECTION 2 FIRST

In *BN v. BMWE*, this Court firmly rejected an expansive reading of Section 2 First offered by the Carriers when they asserted that secondary picketing violated Section 2 First. The Carriers argued that secondary picketing is contrary to "general language of § 2 First" (491 U.S. at 450), the same general language they relied on in this case in arguing that BMWE violated the RLA by striking without advance notice. In particular, the Carriers argued in *BN v. BMWE* that "the duty [Section 2 First] places on employees to attempt to settle disputes and thereby avoid any interruption to interstate commerce", together with what they described as the RLA purpose of "prevent[ing], if possible wasteful strikes and

interruptions of interstate commerce", should be read to prohibit secondary picketing. *Id.* at 450. However, the Court rejected their attempt to broaden the reach of Section 2 First, noting that the position urged by the Carriers was inconsistent with earlier decisions of the Court that had inferred enforceable RLA obligations only when there were specific RLA commands. *Id.* at 451-452.

The *BN v. BMWE* Court stated that its holding in *Brotherhood of RR. Trainmen v. Chicago River & Indiana RR.* 353 U.S. 30 (1957), that unions may be enjoined from striking over minor disputes, was based on "the express language of § 3 First, which unambiguously compelled arbitration of minor disputes, the only inference drawn was that a strike was incompatible with this explicit obligation". 481 U.S. at 452 n. 15. The *BN v. BMWE* Court said that in the case then before it, no "'basic command' of the RLA" could be said to have been violated by the secondary picketing; and that it was being asked not only to infer that a statutory duty was enforceable by injunction, "*but also that such a duty exists*". *Id.*, emphasis added. In rejecting the Carriers' attempt to broaden the reach of Section 2 First, the Court also distinguished *BN v. BMWE* from its one prior decision that found an enforceable obligation under Section 2 First: *CNW v. UTU*. The *BN v. BMWE* Court noted that the *CNW v. UTU* Court had found that because the "express language of Section 2 First creates a duty to 'exert every reasonable effort' to settle disputes", parties have an obligation to bargain in good faith. But the *BN v. BMWE* Court observed that the *CNW v. UTU* Court found that the duty to bargain in good faith was actually expressed in the statute, and that the only inference it drew was that the duty was legally enforceable. The Court then stated that "[t]he language of § 2

First does not contain, however, either an express proscription of secondary activity or a suggestion that the scope of self help is limited". 491 U.S. at 452 n. 15.[2]

This limited reading of Section 2 First in *BN v. BMWE* was consistent with the Court's limited view of the scope of Section 2 First from the outset of the RLA. For example, in *Virginian Ry. Co. v. System Federation No. 40, RED*, 300 U.S. 515 (1937), the Court relied on RLA Section 2 Ninth in rejecting a carrier's claim that its refusal to treat with the representative of its employees was not actionable. The Court acknowledged that such refusal to treat with a union had been held not actionable under the statute that preceded the RLA that had language similar to that of Section 2 First. However, the Court, referring to the language of Section 2 First, said that "these words [Section 2 First] no longer stand alone and unaided by the mandatory provision of the statute as they did when first enacted". 300 U.S. at 544, *citing* the 1934 amendment that added Section 2 Ninth.[3]

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[2] In the courts below, the Carriers argued that *BN v. BMWE* is irrelevant to this case because there the parties had exhausted RLA dispute resolution processes. But the Court in *BN v. BMWE* did not base its rejection of the carriers' Section 2 First claim on the fact that the parties had completed bargaining and mediation. It rejected the carriers' reliance on Section 2 First as a matter of law. In *BN v. BMWE*, the Court considered and rejected an expansive reading of Section 2 First that was premised on policy arguments similar to those presented in this case. The Court hewed to its prior precedent that a party has a cause of action under the RLA only when there is "express language" creating an "explicit obligation" involving a "'basic command' of the RLA". The Court stated that it would not find a cause of action when it was asked not only to infer that a that a statutory duty is so crucial that it may be enforced "but also that such a duty exists". *Id.* at 450-452 and n.15.

[3] *See also Texas & New Orleans R.R. Co. v. B'hood of Ry. & Steamship Clerks*, 281 U.S. 548,(1930)—while carrier interference with employee choice of representative is not actionable under Section 2 First, it is actionable under Section 2 Third; "Congress was not content with the general declaration of the duty of carriers and employees to make every

Even *CNW v. UTU*, which is the one case where the Court did find an enforceable duty under Section 2 First, the Court described a limited reading of Section 2 First as to the scope of the duty imposed, and the scope of judicial action permitted. It held only that there is a duty to deal in good faith, and that judicial enforcement is permissible to the extent necessary for that duty to be meaningful. 402 U.S. at 577-582. In this regard, it is important to recognize that the issue in that case was whether 2 First imposed any obligation at all–whether it was merely hortatory as the four dissenters said, or whether it actually imposed some duty. The Court majority rejected a suggestion in a prior case (*General Committee v. MKT, supra.)* that Section 2 First was merely a statement of policy, it then found bad faith bargaining to be actionable under Section 2 First because compliance with the Act's bargaining procedures "is meaningless if one party goes through the motions with 'a desire not to reach an agreement'". 402 U.S. at 578. On that basis, the Court concluded that the duty to exert every reasonable effort to

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reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes . . . but added this distinct prohibition against coercive measures [Section 2 Third]"; "[w]hile an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms [i.e. 2 First], a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded". 281 U.S. at 567-568. And *see Brotherhood of RR. Trainmen v. Chicago River & Indiana RR., supra.*, 353 U.S. at 36—the provision for mandatory arbitration of minor disputes was a reaction to the weakness of the 1926 Act which was ineffective in handling contract interpretation disputes without disruptions of commerce a "condition []in marked contrast to the declared purpose of the 1926 Act '. . . to settle all disputes whether arising out of the application of . . . agreements or otherwise, in order to avoid any interruption of commerce or to the operations of any carrier growing out of any dispute between the carrier and the employees thereof'. § 2 First". *Id.* at 36, quotations and ellipses in original.

make and maintain agreements and settle disputes required that parties bargain in good faith, and that this limited duty could be enforced in the courts.[4]

The *CNW v. UTU* Court also cited the general Norris LaGuardia Act (29 U.S.C. §101 *et seq.*) bar against injunctions in labor disputes as requiring circumspect application of Section 2 First, because "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place". *Id.* at 583. The *CNW v. UTU* Court concluded that the result it reached flowed from its duty to give effect to all of the labor laws, and the need to reconcile mandates of different Congresses with differing political make-ups and differing views on labor relations, and to not restrict itself to pieces of legislation that are in accord with the Justices' personal views of sound labor policy. *Id.* at 583-584. Thus, in the one case where this Court found a cause of action under Section 2 First, it did not find an expansive duty, but rather a narrowly limited duty.

The panel majority's misunderstanding of this Court's decisions under Section 2 First is clearly demonstrated by its statement that Section 2 First applies to actions that interrupt

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[4] In holding that Section 2 First was not a mere statement of policy, the Court said that the duty imposed was enforceable by "whatever means appropriate on a case-by-case basis". But it did not say or mean that the courts are free to define the scope of Section 2 First as they believe fit. Rather the Court concluded only that, as to the duty that is imposed, case by case adjudication is necessary because Section 2 First did not expressly enumerate particular types of conduct that would be inconsistent with the duty to exert every reasonable effort to make and maintain agreements and settle disputes. 402 U.S. at 576, 577. Moreover, the whole context of the discussion of case by case adjudication was after a review of the history of the RLA and prior RLA precedent regarding the limited role of the courts under the Act. *Id.* at 574-577. The point of that discussion was just to show that Section 2 First is not without effect, and that it does at least create the binding obligation to bargain in good faith.

commerce, not to actions that make dispute resolution more difficult, and that "strike prevention, not dispute resolution *per se*, was 'the major purpose of the Railway Labor Act'". App. B at 9a-10a. This Court recognized in *CNW v.UTU*, that the actual duty is to exert every reasonable effort to settle disputes. That is why bad faith bargaining violates Section 2 First. While bad faith bargaining does not "in and of itself" interrupt commerce, it certainly makes dispute resolution more difficult. Contrary to the Fifth Circuit's decision, in *CNW v.UTU*, this Court recognized that dispute resolution *per se*, not strike prevention, is the major purpose of the RLA.

Moreover, as is described above, the *BN v. BMWE* case came after *CNW v. UTU;* and the *BN v. BMWE* Court applied a narrow reading of Section 2 First. It specifically described the limited reach of the holding in *CNW v. UTU*, noting that the *CNW v. UTU* decision found that the "express language of Section 2 First creates a duty to 'exert every reasonable effort' to settle disputes", and it only inferred that the duty was legally enforceable, but"[t]he language of § 2 First does not contain, however, either an express proscription of secondary activity or a suggestion that the scope of self help is limited". In *BN v. BMWE* no "'basic command' of the RLA" could be said to have been violated; and the Court was being asked to not only infer that a statutory duty was so crucial that it was enforceable by injunction, "*but also that such a duty exists*". *Id.*,emphasis added.

It is therefore clear that when *CNW v. UTU* is read together with *BN v. BMWE*, the precedent of this Court rejects the notion that Section 2 First can be violated when a union does not give advance notice of strikes because, as in *BN v. BMWE*, there is no such statutory command in Section 2 First. And as in *BN v. BMWE*, the general statement of purpose of Section 2 First is not sufficient to create the sort of new prohibition created by the Fifth Circuit, because in this

case, like *BN v. BMWE*, one would have to infer not only a right to enforcement of a purported duty, but also that a duty exists.[5]

The Court's limited readings of Section 2 First in *CNW v. UTU* and *BN v. BMWE* were consistent with its many decisions defining a limited role for the courts under the RLA. In *Texas & New Orleans R.R. Co., supra.* 281 U.S. at 563-566, the Court described the RLA as the result of an agreement by labor and management that generally provided mechanisms for adjustment disputes between the parties, with only certain limited obligations enforceable in court. In *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 300(1943), the Court stated that the courts have jurisdiction to enforce the RLA only when "the absence of jurisdiction of the federal courts mean[s] a sacrifice of a right which Congress had created". And in *General Committee of Adjustment v MKT, supra.,* the Court stated that the statute relied heavily on "mediation, conciliation and arbitration . . . in addition to the available economic weapons . . ." and that only in "certain phases of this controversial subject" had Congress relied on "compulsions of the law". 320 U.S. at 322-323. The Court observed that "Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or to far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." *Id.* at 322. The Court further stated that "in view of the pattern of

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[5] In the courts below, the Carriers argued that BMWE contends that Section 2 First creates no duties. BMWE recognizes that such a position was rejected in *CNW v.UTU*. But, BMWE submits that this Court's decisions hold that Section 2 First creates only the limited duty to bargain in good faith, and the RLA establishes only specific duties based on express commands, not open-ended duties based on stated goals.

this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable [sic] in the courts should be implied". *Id.* at 337. And more recently, the Court in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, supra.*, 489 U.S. at 441, held that a carrier did not violate the RLA by hiring "replacement workers" during a strike and giving bidding preferences to employees who work during a strike, stating that "we have understood judicial intervention in RLA procedures to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the'" RLA. 489 U.S. at 442 citations omitted.

Thus, it is clear that the Fifth Circuit has created a duty that does not exist under the RLA, and applied Section 2 First in a way that directly conflicts with decisions of this Court that have rejected broad readings of Section 2 First and repeatedly limited the scope of application of that provision.

II. THE COURTS BELOW EFFECTIVELY AMENDED THE RLA BY JUDICIAL ACTION BASED ON A LABOR RELATIONS POLICY NOT EXPRESSED IN THE STATUTE; If ALLOWED TO STAND, THESE DECISIONS WILL HAVE A RADICAL IMPACT ON APPLICATION OF THE RLA

BMWE also respectfully submits that the Court should review the decision of the Fifth Circuit because the Court of Appeals exceeded its authority by effectively amending the RLA by judicial fiat, thereby significantly altering the labor relations scheme for two important industries.

The language of Section 2 First is as follows:

> It shall be the duty of all carriers, their officers agents and employees to exert every reasonable effort to make

> and maintain agreements concerning rates of pay rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

There is nothing in that provision that requires advance notice before a party exercises self help. As is noted above, unlike RLA Section 6 (45 U.S.C. § 156), there is no Section 2 First specification of any procedural requirements that must be followed before a party exercises self help. However, the courts below held that BMWE violated Section 2 First solely because the Union had not given advance notice of strike plans in a number of disputes, and therefore could be ordered to give advance notice in future disputes. In doing so, the courts below created a duty, and found a violation of law, without any basis in the language of the statute.

In the absence of any statutory language actually requiring advance notice, the courts below held that the general Section 2 First duty to exert every reasonable effort to make and maintain agreements and to settle disputes, and the expressed *purpose* of that provision to avoid disruptions of commerce, supported a permanent injunction under Section 2 First requiring BMWE to give advance notice of its plans to exercise self help. But in doing so, the Courts below confused the *goal* of Section 2 First with the actual *duty* it imposes.

As is clear from *CNW v. UTU* and *BN v. BMWE*, the only duty imposed is to exert every reasonable effort to make and maintain agreements and to settle disputes. Parties are not required to settle or refrain from disrupting commerce, only to confer and make every reasonable effort to resolve a dispute. That duty does not require a party to forego the use of self help in favor of making or maintaining an agreement that the party would not otherwise accept, or to acquiesce in a

settlement of a dispute that it deems unsatisfactory. *Detroit and Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S.142(1969); *BN v. BMWE*. The duty imposed by Section 2 First does not restrict the manner in which a party exercises self help once every reasonable effort to settle has been made. *BN v. BMWE*. Nor does Section 2 First establish procedural steps that must be followed prior to the exercise of self help.

The courts below expressed concern about the fact that there were multiple cases in which BMWE struck without advance notice. App. B at 4a-5a, 7a, 9a; App. C at 34a-44a. But that fact cannot in and of itself support a finding of a violation of Section 2 First. There is no statutory requirement for advance notice, so there is no violation of the statute just because there were a number of cases where no advance notice was given. If there actually was an RLA prohibition against strikes without advance notice, evidence of multiple strikes without notice could be relied on as supporting a prospective advance notice injunction. But, while repetition of unlawful behavior may be an appropriate consideration in formulation of a remedy when there is a violation of law, repetition itself does not make behavior unlawful.

Moreover, in none of the previously litigated cases cited by the courts below was BMWE found to have violated a supposed Section 2 First duty to give advance notice of strikes. Rather, the courts in those cases found that BMWE violated RLA Section 3 by striking over disputes that were required to be arbitrated. BMWE submits that since only a violation of a duty imposed by Section 2 First is actionable, the courts below erred in finding a Section 2 First violation and granting an injunction under Section 2 First based on the goal of that provision and multiple instances of violations of RLA Section 3 that were all litigated in prior cases.

Ultimately, the basis for the injunction appears to be the assessment of the courts below that RLA Section 3 is

deficient. Although RLA Section 3 has permitted issuance of temporary restraining orders against strikes within hours, and allows for quick classification of disputes as major or minor, Section 3 has not operated to stop strikes before they start. The courts below allowed the advance notice injunction because they concluded that it would control conduct that was not regulated by RLA Section 3, and they viewed such an order as consistent with the broadly phrased goal of preventing interruptions of commerce that is expressed in Section 2 First. App. B at 6a, 9a-11a; App. C at 33a-34a, 61a-64a. But, BMWE can not be found to have violated the RLA because its actions were deemed to be inconsistent with the statute's goals, as opposed to its actual commands. Moreover, in affirming the advance notice injunction, the Fifth Circuit disregarded this Court's express admonition in *CNW v. UTU* that courts must be circumspect in applying Section 2 First, because "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act". 402 U.S. at 583. And in reading Section 2 First to impose an enforceable duty based on its "general language" and broad purpose of preventing strikes the Fifth Circuit followed a path expressly rejected by this Court in *BN v. BMWE*. 491 U.S. at 450-452.

Thus, in construing Section 2 First to impose an obligation that does not exist in the statute because they viewed that obligation as consistent with the goal of Section 2 First, the courts below not only applied the statute in a manner that conflicts with this Court's decisions, they also found an RLA violation and issued and injunction based on their own notions of "common sense" and "good policy". But courts cannot create statutory obligations in order to cover conduct that they believe should be regulated by creating a regulatory scheme where none actually exists in the law. There are places where rail labor believes that the RLA is deficient because it does not cover, or permits, certain types of carrier

action, but the law must be changed by Congress, not the courts. This is especially true with respect to this statute, which was enacted as negotiated by the regulated parties, and representatives of the parties, and key members of Congress, described the RLA as providing for only limited judicial and administrative involvement; and they expressly stated that they viewed the statute as primarily creating processes that would enhance the likelihood of settlement of disputes while generally providing for limited government involvement in labor-management relations.

As this Court observed in *CNW v. UTU* and *BN v. BMWE*, the courts cannot usurp the role of Congress by effectively re-writing the RLA to comport with their own views of proper labor policy, rather than applying the policy adopted by Congress 76 years ago. 402 U.S. at 583-584, 481 U.S. at 443, 452.

BMWE further submits that if the Decision below is allowed to stand, it will substantially broaden the type of conduct that will be covered by Section 2 First and greatly expand the role of the courts in the administration of the Act. Whereas other RLA duties are enforceable because they involve specific and express commands of the statute, the decisions below create a wholly new enforceable obligation out of a general goal. The enforcement of this new duty will necessarily require the courts to supervise and examine the tactics of labor and management. Actions that now are permissible for both unions and management would violate this new Section 2 First duty created by the Fifth Circuit.

In *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 *U.S.* 490 (1989), this Court held that a carrier had no obligation to negotiate over its decision to go out of business (*id.* at 507-510), and no obligation to maintain the status quo (*i.e.* remain in business) while bargaining over the effects of a decision to go out of business. *Id.* at 512. However, under the Fifth Circuit's expansive view of Section 2 First, there would be a

cause of action in that situation because the carrier's position could be described as inconsistent with a duty to exert every reasonable effort to resolve the dispute.

Similarly, in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, supra.*, 489 U.S. at 441, the Court held that a carrier can hire "replacement workers" during a strike, and give bidding preferences to employees who work during a strike, without violating RLA Sections 2 Third and Fourth. But such actions would be inconsistent with the Section 2 First duty as re-defined by the courts below because they clearly would diminish the likelihood of settlement of the underlying dispute.

Under the reasoning of the Fifth Circuit's decision, either party's refusal of an offer of interest arbitration could be violative of the new expansive reading of Section 2 First, even though interest arbitration is voluntary under RLA Section 7. And courts could be called-upon to determine whether a union or a carrier has acted in good faith by refusing to settle a minor dispute, by refusing to maintain the status quo pending arbitration or by refusing to follow an adverse arbitration ruling in a later case. Under Fifth Circuit's reading of Section 2 First, a union or a carrier could be compelled by a court to produce information for use in grievance handling and arbitration because that might facilitate settlement of the dispute, even though courts have held that no such duty exists elsewhere in the RLA. *See e.g., Pacific Fruit Express v. Union Pacific*, 826 F. 2d 920, 922-23 (9th Cir. 1987).

In each of the situations described above, it could be argued that although the party's action does not violate some express command of another part of the RLA, the party would certainly be acting in a manner inconsistent with, and in violation of, the Fifth Circuit's interpretation of Section 2 First based on the broadly read duty to exert every reasonable effort to settle, and the expressed goal of that provision.

Courts would have to supervise this obligation and determine whether one side or the other is being too aggressive or has over-responded to a provocation. This has not been the approach of the RLA which recognizes that there will be disputes, but which limits the involvement of the Courts to circumstances when it is necessary to enforce an express, specific prohibition. That is why the Court in *CNW v. UTU* was so careful to limit the scope of actionable conduct under Section 2 First. And that is why the *BN v. BMWE* Court rejected the Carriers' prior effort to create a duty out of the "general language of Section 2 First" and its purpose. But now the Fifth Circuit has adopted a broad reading of Section 2 First, expanding the scope of actionable conduct of unions and carriers in a manner that is without basis in the language of the statute and conflicts with prior decisions this Court. If this decision is not reversed, both labor and management will bring before the courts challenges to a whole host of tactics and actions that have not previously been regulated by the RLA, and have not been subject to judicial oversight.

Regardless of one's view of BMWE's actions, the courts may not regulate its actions in the absence statutory authority. It is therefore necessary for this Court to review the decision below to reverse this judicial usurpation of the role of Congress in setting labor policy and the scope of regulation of union and carrier conduct.

CONCLUSION

For the foregoing reasons, BMWE respectfully urges the Court to issue a writ of certiorari to the Court of Appeals for the Fifth Circuit to review and reverse the judgment of that Court in *Burlington Northern And Santa Fe Railway Company, et al. v. Brotherhood of Maintenance of Way Employes supra.*

Respectfully submitted,

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